

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CHELAN

Timothy Borders, et al.,

Petitioners,

v.

King County and Dean Logan, its Director of
Records, Elections and Licensing Services, et al.,

Respondents,

v.

Washington State Democratic Central
Committee,

Intervenor-Respondent,

v.

Libertarian Party of Washington State et al.,

Intervenor-Respondents.

No. 05-2-00027-3

PETITIONERS' RESPONSE TO
KING COUNTY'S MOTION FOR
PROTECTIVE ORDER RE:
DEPOSITIONS OF DEAN
LOGAN AND BILL
HUENNEKENS

I. INTRODUCTION

Although King County's motion for a protective order is primarily a dispute between King County and the Washington State Democratic Central Committee ("WSDCC"), resolution of the dispute threatens to delay resolution of this case and interfere with Petitioners' interests in conducting timely discovery. The equitable course

1 of action is to allow the depositions to proceed promptly; order King County to complete
2 production of its documents in a timely manner; and, rather than speculate as to the effect
3 the remaining documents might have on the need for another round of depositions, permit
4 the parties to return to the Court after the documents have been produced and request
5 second depositions that will occur only upon a demonstrated showing of good cause.
6 Continued delays by non-parties and intervenors should not be permitted to prejudice
7 either Petitioners' or the public's interest in a prompt resolution of this election contest.

8 II. FACTS

9 For months now, Petitioners have been seeking information to understand what
10 happened in King County with this election. Towards that end, on March 4, 2005,
11 Petitioners served subpoenas *ad testificatum* on King County setting the deposition of
12 Dean Logan for March 15 and the deposition of Bill Huennekens for March 17. *See*
13 Declaration of Robert Maguire Supporting Petitioners' Response to King County's Motion
14 for Protective Order ("Maguire Dec.") ¶ 2, Ex. A. Petitioners anticipated that the
15 testimony of these high level elections officials would answer basic questions that could
16 allow Petitioners to focus any additional discovery on key issues and would likely make it
17 possible to limit the scope of document requests. *Id.*, ¶ 3.

18 On Thursday, March 10, counsel for King County informed Petitioners' counsel
19 that King County preferred to make Mr. Logan and Mr. Huennekens available for
20 depositions only once for all parties. King County indicated that the depositions could
21 extend to multiple consecutive days so that the parties would have a full opportunity to ask
22 their questions. King County also indicated that Mr. Logan and Mr. Huennekens were
23 prepared to proceed with the depositions on the March 15 and March 17, but that the
24 WSDCC was not prepared to conduct its depositions at that time. Petitioners told King
25 County that they were amenable to a reasonable extension of the dates for the depositions
26 so that King County could complete the production of documents to the WSDCC with the
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1 understanding that if King County had not provided the WSDCC with the documents,
2 Petitioners would be permitted to proceed with their depositions and King County could
3 object later to any attempt by the WSDCC to depose the witnesses again. *Id.*, ¶ 4.

4 Petitioners' counsel also discussed the deposition scheduling with counsel for the
5 WSDCC. The WSDCC indicated that it did not object to Petitioners conducting their
6 depositions as scheduled, but would not agree to conduct its own depositions until King
7 County completed its production of documents at some uncertain future date. *Id.*, ¶ 5.

8 On March 14, in an attempt to avoid taking up the Court's time with a discovery
9 scheduling dispute, to accommodate King County's preference for combined depositions,
10 and to minimize the inconvenience to the witnesses, Petitioners agreed to delay the
11 depositions for one or two weeks anticipating that the WSDCC would have received
12 during that time the documents it required. Petitioners indicated that if, however, WSDCC
13 was not in a position to proceed with the depositions in the next two weeks, Petitioners
14 would proceed with their depositions. *Id.* ¶ 6, Ex. B.

15 On March 15, King County requested that Petitioners set Mr. Logan's deposition
16 for March 28 and Mr. Huennekens' deposition for March 31. *Id.* ¶ 7. On March 17,
17 Petitioners provided amended notices for the depositions setting them on the dates
18 proposed by King County. *Id.* ¶ 8, Ex. C. The WSDCC again indicated that it had not
19 received sufficient documents to proceed with the depositions but that it did not object to
20 Petitioners conducting their depositions as scheduled. *See Declaration of Donald J. Porter*
21 *in Support of King County's Motion for a Protective Order*, ¶ 4, Ex. B.

22 On March 21, counsel for the interested parties conferred regarding the schedule.
23 Petitioners indicated that they could show some limited flexibility with the deposition
24 dates, but that they had already moved the depositions back two weeks and the depositions
25 and discovery process needed to move forward promptly. *Maguire Dec.*, ¶ 9. The parties
26 were not able to reach an agreement. *Id.*

1 On March 23, King County produced a box of documents containing copies of
2 documents relating to the 348 unverified provisional ballots that were counted on election
3 day after being cast in a manner other than as required by law. *Id.*, ¶ 10. On March 24,
4 2005, King County notified Petitioners and the WSDCC that it has files containing
5 canceled voter registrations for the calendar year of 2004 that will be available for the
6 parties on CD's on March 24. *Id.*, ¶ 11. In the declaration filed by King County's counsel,
7 King County indicates that it will be able to produce by March 25, all responsive
8 documents relating to the WSDCC's requests regarding illegal felon voters, deceased
9 voters, and double voters. *See Declaration of Donald J. Porter in Support of Motion for*
10 *Protective Order*, ¶7.

11 In light of the production of these documents, Petitioners are willing to make
12 another attempt to accommodate King County and the WSDCC with regard to deposition
13 scheduling. Petitioners are willing again to move the depositions and propose to conduct
14 Mr. Logan's deposition on April 1, 2005 and Mr. Huennekens' deposition on April 5,
15 2005. *Id.*, ¶ 12. Rather than proceeding with Mr. Logan's deposition on Monday, March
16 28, the April 1 deadline will provide the WSDCC with a full week to prepare after the
17 Court's ruling on King County's motion and will provide the WSDCC with a full week to
18 review the documents King County has produced and will produce this week. Conducting
19 the depositions on those dates will not interfere with the witnesses' vacation plans and will
20 ensure that Petitioners can receive answers to their questions in a timely manner. Further
21 delays without Court ordered deadlines threaten to derail these proceedings and delay trial
22 unnecessarily.

23 III. ARGUMENT

24 Discovery has been slow, arduous, and expensive in this case. The Court's
25 intervention is needed to move the case more rapidly toward a prompt trial of Petitioners'
26 claims. Of course, proceedings under the election contest statute are not ordinary civil
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1 proceedings that may continue over an extended period of time. The public's interest is
2 too great to permit delays and "the spirit of the law dictates that contests instituted
3 thereunder *shall be promptly heard and determined.*" *Thomas v. Van Zandt*, 56 Wash.
4 595, 599, 601 (1910) (interpreting a predecessor statute that was substantively identical in
5 relevant respects to the current election contest statute) (emphasis added). Petitioners have
6 tried to move discovery forward promptly while making reasonable accommodations to the
7 other parties regarding scheduling. It would be unfair and inequitable to delay Petitioners'
8 ability to conduct discovery any further in a case that must proceed promptly toward trial.

9 **A. The Documents Sought are Not Necessary for the Depositions of these**
10 **High Ranking Officials.**

11 The WSDCC identified five categories of documents it contends are necessary for
12 the depositions of Mr. Logan and Mr. Huennekens. *See* WSDCC's Response to King
13 County's Motion for Protective Order Re: Depositions of Dean Logan and Bill
14 Huennekens ("WSDCC's Response Brief"), p. 5-9. The documents sought are primarily
15 pages of poll books, ballot envelopes, databases, and spreadsheets – documents about
16 details and specific votes. It is unlikely that high ranking elections officials will be
17 knowledgeable about such detailed information. Rather, these depositions will likely
18 resolve questions regarding processes and procedures, and direct the parties to the
19 witnesses who will be able to answer more detailed specific questions. Accordingly,
20 Petitioners do not believe that any of the documents WSDCC seeks are necessary for these
21 particular depositions.

22 **B. King County has Produced or Will Produce any Relevant Documents**
23 **this Week Such that there is No Good Reason for Further Delay.**

24 Although Petitioners do not believe the documents are necessary for these
25 depositions, the WSDCC now has or will have shortly the majority of the documents it
26 seeks and could be prepared for depositions beginning at the end of next week.
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1 On March 23, King County produced the responsive documents regarding the 348
2 unverified provisional ballots King County previously acknowledged were counted after
3 being cast in a manner not provided by law. The production apparently satisfies the third
4 item referred to in the WSDCC's response brief. *Id.* at p. 7-8.

5 On March 24, King County is making available on CD's the canceled voter file
6 from January 1, 2004 through December 31, 2004 and has made the remaining documents
7 regarding canceled registrations available for inspection. *See* Maguire Dec., ¶ 11 and
8 Porter Dec., Ex. D. The production and availability of the documents apparently satisfies
9 the fourth item referred to in the WSDCC's response brief. *See* WSDCC Response Brief,
10 p. 8-9.

11 King County has indicated that it will have available on March 25, copies of poll
12 book signatures, absentee ballot envelope, and provisional ballot envelopes for
13 approximately 900 alleged illegal voters. Porter Dec., ¶ 7. The production will apparently
14 satisfy the first item referred to in the WSDCC's response brief. *See* WSDCC Response
15 Brief, p. 6.

16 With respect to documents relating to problems with King County's voter
17 registration database, the fifth item sought by WSDCC, the WSDCC admits that it has
18 received responsive documents and only seeks assurances that the production is complete.
19 WSDCC Response Brief, p. 9. A request for assurances should not be a sufficient basis to
20 prejudice Petitioners' rights to move forward with their depositions.

21 Plainly, the WSDCC will have the relevant documents it purportedly requires and
22 could proceed with the depositions at the end of next week.

23 **C. The Remaining Documents are Irrelevant to this Contest and Beyond**
24 **the Authorized Scope of Discovery.**

25 In addition to the four categories of documents discussed above, the WSDCC seeks
26 documents in a fifth category: documents regarding rejected provisional ballots.

27 According to newspaper reports, the WSDCC intends to investigate whether provisional

1 ballots were wrongfully rejected by elections workers in King County because of signature
2 verification errors or other errors, misconduct, or neglect by election officials. Maguire
3 Dec., Ex. D. Presumably the WSDCC intends to ask the Court to count any provisional
4 ballots the WSDCC thinks it can rehabilitate in an attempt to offset the large numbers of
5 illegal votes that were wrongfully counted in King County. Such a theory is, however,
6 inconsistent with the election contest statute, contrary to the Court's previous rulings, and
7 contrary to positions taken by the WSDCC in discovery. Accordingly, the documents are
8 not relevant to the contest, are outside the authorized scope of discovery, and the timing of
9 their production should not have any influence on the scheduling of depositions in this
10 case.

11 While Petitioners agree with the WSDCC that there were many errors in King
12 County that raise serious doubts as to the accuracy of the election results, the only relevant
13 errors in this election contest are those pled by Petitioners in their election contest petition.
14 If the WSDCC intended to raise allegations of error, misconduct, or negligence, the
15 WSDCC should have filed its own petition or answered Petitioners' pleading with a
16 responsive pleading that asserted counterclaims or affirmative defenses (as did some of the
17 original respondents, *see, e.g.*, Response and Affirmative Defenses of Respondents Pierce
18 County and Pat McCarthy, Pierce County Auditor, dated January 14, 2005). The statutory
19 deadline for filing an election contest petition has long since past, however, as has the
20 deadline under the Civil Rules for filing a responsive pleading asserting counterclaims or
21 affirmative defenses. Even if the election contest statute contemplated rehabilitating
22 rejected ballots, it is too late for the WSDCC to pursue such a theory.

23 Furthermore, the Court has already dismissed an analogous claim brought by
24 Petitioners. In their original petition, Petitioners alleged that "the votes of lawfully
25 registered voters were not counted, and the failure by Respondents to count them, when
26 presented with evidence of Respondents' errors, was arbitrary, capricious, wrongful, and a
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1 violation of their obligations under Washington's election laws. Moreover, Petitioners'
2 rights to equal protection of the laws have been violated by the inconsistent treatment of
3 ballots wrongly rejected by Respondents, and the lawful, valid votes of electors, including
4 the petitioners, have been diluted by the counting of invalid or illegal absentee ballots cast
5 by lawfully registered voters had been wrongfully rejected by elections officials." *See*
6 Election Contest Petition, p. 4. The WSDCC moved to dismiss those claims (*see*
7 WSDCC's Motion to Dismiss Causes for Election Contest, p. 20-21) and the Court granted
8 that request (*see* Order Denying in Part and Granting in Part Motions of Respondents and
9 Intervenors, entered February 18, 2005).

10 In response to Petitioners' discovery requests seeking information and documents
11 regarding absentee and provisional ballots that were wrongfully rejected, the WSDCC did
12 not provide any responsive information or documents and instead objected:

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14 To the extent this request relates to equal protection claims
15 relating to the submission of signature verification forms
16 after November 16, 2004, the WSDCC objects to this request
17 as beyond the scope of permissible discovery and not
18 reasonably calculated to lead to the discovery of admissible
evidence. The Court has dismissed such claims. Otherwise,
the WSDCC's investigation is ongoing and it will
supplement its answer as appropriate.

19 Maguire Dec., ¶ 14, Ex. E. The WSDCC cannot have it both ways. If their discovery
20 responses are correct and the Court's ruling on the motion to dismiss precludes the parties
21 from introducing evidence regarding wrongfully rejected ballots, then the WSDCC is not
22 entitled to insist on receipt of such documents from King County for use in depositions in
23 these proceedings.

24 IV. CONCLUSION

25 Election contests are expedited proceedings. While trying to diligently pursue their
26 case, Petitioners have acted reasonably in offering to accommodate the concerns expressed
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1 by the Intervenor and Non-Party King County. Petitioners have already delayed these
2 depositions by two weeks and are again willing to delay the depositions until April 1 and
3 April 5. The Court should order the depositions to proceed on those dates and require
4 King County to complete production of its documents.
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7 DATED this 24th day of March, 2005.

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